

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**R.S.A. No.94 of 2017**

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree dated 16.12.2016 and 27.12.2016 respectively passed by the learned District Judge, Jagatsinghpur in R.F.A. No.72 of 2015 confirming the judgment and decree dated 31.08.2015 and 10.09.2015 respectively passed by the learned Civil Judge, Junior Division, Jagatsinghpur in Civil Suit No.132 of 2012.

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***Basanta Kumar Rout***

....

***Appellant***

-versus-

***Gouranga Charan Rout***

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***Respondent***

**Appeared in this case by Hybrid Arrangement  
(Virtual/Physical Mode):**

***For Appellant***

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Mr.Ch. P.K. Mishra  
(Advocate)

***For Respondent***

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**CORAM:**

**MR. JUSTICE D.DASH**

**Date of Hearing : 13.09.2022 : Date of Judgment:26.09.2022**

***D.Dash,J.*** The Appellant, by filing this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), has assailed the judgment and decree dated 16.12.2016 and 27.12.2016 respectively passed by the learned District Judge, Jagatsinghpur in R.F.A. No.72 of 2015.

By the same, the Appeal filed by the present Appellant, as the aggrieved Defendant under section 96 of the Code, has been dismissed and thereby the judgment and decree dated 31.08.2015 and 10.09.2015

respectively passed by the learned Civil Judge, Junior Division, Jagatsinghpur in Civil Suit No.132 of 2012 in decreeing the suit filed by the present Respondent, as the Plaintiff, have been confirmed. The suit filed by Respondent (Plaintiff) has been decreed in permanently restraining the Appellant (Defendant) from entering upon the suit land and interfering with the peaceful possession of the Respondent (Plaintiff) of the said suit land.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Trial Court.

3. The Plaintiff's case is that the land under M.S. Plot No.297 to an extent of Ac.0.50 decimals appertaining to M.S. Khata No.138 in Mouza-Baulanga stands jointly recorded in the name of the Plaintiff and Defendant, who are the two sons of Nisamani Rout and as such, full blooded brothers with Gunanidhi Rout and Nakula Rout. The interest as recorded therein to the extent of 5 anna 4 pahi was resting with the Plaintiff and Defendant whereas Gunanidhi Rout and Nakula Rout were having 5 anna and 4 pahi interest each.

It is the specific case of the Plaintiff that before the publication of the M.S. Record of Right in the year 1984, there was an amicable partition of the suit amongst the recorded owners. It is stated that Ac.0.17 decimals of land, which forms is the subject matter of the suit from the western side, had been allotted to the Plaintiff and Defendant jointly. On 28.02.2006, the Plaintiff and Defendant had effected an amicable partition between them in respect of the said Ac.0.17 decimals of land with their other joint property and allotment sheets were prepared wherein all signed. Gunanidhi and Nakula had also put their

signatures admitting the amicable partition and allotment made in favour of the Plaintiff and Defendant. So, it is said that since 28.02.2006, the Plaintiff is in possession of that Ac.0.17 decimals of land appertaining to Plot No.297 from the western side has been allotted to him. It is further stated that on 28.02.2006, a memorandum of partition between the Plaintiff and Defendant had come into being. Again on 4.4.2006, it was reiterated and notarized. The Plaintiff and Defendant too then had sworn one joint affidavit. It is stated that the Plaintiff is the exclusive owner in possession of the suit land and the Defendant has no manner or right, title and interest over the same.

Alleging that some time prior to the date of institution of the suit, the Defendant threatened the Plaintiff to dispossess him from the suit land, the present suit came to be filed seeking permanent injunction against the Defendant in respect of the land measuring Ac.0.17 decimals from the western side of M.S. Plot No.297 appertaining to M.S. Khata No.138 of Village-Baulanga.

4. The Defendant, in this written statement, has not disputed the position that the suit land was jointly recorded in M.S. Record of Right in the name of they two brothers, i.e., Basanta Kumar Rout and Gouranga Charan Rout, sons of late Nisamani Rout having 5 anna 4 pahi interest. It is also not disputed that Gunanidhi and Nakula each had 5 anna and 4 pahi interest over there. It is further stated that the compromise petition, which had come into being on 28.02.2008 was a preliminary draft awaiting its enforcement and subsequent Memorandum of Allotment as also the affidavit are just reiteration of the said draft but not final as he says. The Defendant states that those deeds had no force in the eye of law have not created title in respect of the suit land in favour of the Plaintiff. So, it is said that the Defendant

being a co-sharer in respect of the suit land with the Plaintiff; he cannot be enjoined at the instance of the Plaintiff, who has filed the suit. Accordingly, it is said that the suit with the prayer being incompetent is liable to be dismissed.

5. The Trial Court, on the above rival pleadings, in total has framed seven issues. Coming to answer the crucial issue, which is issue no.4 whose answer has the final say over the fate of the suit; upon examination of the evidence and their appreciation, at its level, finding has been returned that the Plaintiff has been able to prove the fact that there was prior partition in metes and bounds between him and the Defendant in respect of their properties including the suit land. Basing upon this and returning another finding that the evidence on record is not sufficient to show that the Plaintiff has not been dispossessed by the Defendant during pendency of the suit, the Defendant has been permanently enjoined under the decree.

6. Being aggrieved by the aforesaid judgment and decree of permanent injunction passed in favour of the Plaintiff, the Defendant having moved the First Appellate Court, his sufferings from the said judgment and decree passed by the Trial Court has continued as those judgment and decree stood confirmed therein.

7. Learned counsel for the Appellant submitted that the findings of the Courts below are not based on proper analysis of evidence on record in the backdrop of the correct provision of law. He further submitted that in view of the admission of the Plaintiff as P.W.1 that the Defendant is in possession of 30 kadis X 100 kadis of the suit land since 2009, the finding of the Court below that the Plaintiff is in possession of the suit land and as such is entitled to the relief of permanent injunction is

wholly unjustified. He also submitted that the Courts below have committed grave illegality by not only admitting the Exts.3 and 4, which the memorandum of allotment sheet dated 04.04.2006 and the joint affidavit respectively but also failed to properly construe those documents as per law in judging their impact and effect in the matter of a decision on the crucial issue. He, therefore, submitted for admission of this Appeal to answer the above as the substantial question of law.

8. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below.

9. It is not in dispute that as per the record of right (Ext.1), the land measuring Ac.0.50 decimals under M.S. Plot No.297 appertaining to M.S. Khata No.138 in Mouza-Baulanga stands recorded jointly in the name of the Plaintiff and Defendant, sons of Nisamani having 1/3<sup>rd</sup> interest and in the name of Gunanidhi and Nakula, each having 1/3<sup>rd</sup> share therein.

The Plaintiff, having filed the suit for permanent injunction against the Defendant, certainly carries the burden to prove the fact as pleaded in the plaint that in an amicable partition between him and the Defendant, the suit land had fallen in his share and had been allotted to him, which he has been in possession there since. The document in this regard is Ext.3, which has been nomenclatured as Memorandum of Allotment. This document has come into being on 04.04.2006 and contains the signatures of the parties as well as the witnesses. The execution of this document is not in dispute. The Defendant questions the admissibility of this document in evidence, which according to him, thus is not required to be viewed in support of the case of the Plaintiff as regards the allotment of the suit land in his share by saying that the same

had not been acted upon and the parties had never enforced and the right on the basis of such allotment, which according to him, has not crystallized.

I have perused that document (Ext.3). The document being nomenclatured as Memorandum of Allotment, it had been clearly indicated therein that the parties had settled their dispute relating to the joint family properties prior to it, i.e., on 28.02.2006 in presence of the local gentries. Both the parties are literate and have signed in the document in English. The said deed read that prior to the said documentation, there had been a settlement of dispute between them in relation to the joint family property and that was with their free consent and sweet will. When the document reads that the same has come into being in reducing the details of the terms and condition and recording the allotment of properties made in favour of the parties on an anterior date, the document has to be taken to be a document brought into existence in evidencing that earlier partition between the parties. So, this document, being not compulsorily registrable as provided in section 17 of the Indian Registration Act, the contention raised from the side of the Defendant that the document ought not to have been looked into for the purpose of the case of the Plaintiff and in his support, has to be overruled. Then the fact that the parties have acted upon it not only finds reflected in the joint affidavit sworn by the parties, but also the oral evidence, which have been appreciated at great length by the Courts below is said to be in that direction. The Defendant then having not been able to rebut all these factual settings through clear, cogent and acceptable evidence. The Plaintiff thus having been found to be in possession of the property in question, the Courts below are right in decreeing the suit.

For all the aforesaid, the submission of the learned counsel for the Appellant that the Appeal merits admission to answer any substantial question of law fails.

**10.** In the result, the Appeal stands dismissed. There shall, however, be no order to cost.

***(D. Dash),  
Judge.***



*Basu*